

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 06-189
Competition in the Market for the)	
Delivery of Video Programming)	

**EX PARTE COMMENTS OF
INDEPENDENT MULTI-FAMILY
COMMUNICATIONS COUNCIL
(IMCC)**

INDEPENDENT MULTI-FAMILY COMMUNICATIONS COUNCIL

Dated: December 31, 2006

INTRODUCTION

The Independent Multi-Family Communications Council ("IMCC") submits these *ex parte* comments in response to the Notice of Inquiry ("NOI") in MB Docket No. 06-189, the Commission's annual Video Competition Report.

IMCC represents a cross-section of companies on the cutting-edge of the telecommunications revolution leading the United States into the twenty-first century. Its members include private cable operators ("PCOs"), shared tenant services providers, equipment manufacturers, program distributors, broadband Internet service providers ("ISPs") and, importantly, residential property management and development companies. While IMCC members originally concentrated their competitive entry efforts exclusively on video services, the last ten years have marked an expansion into the provision of voice and data communications services to residents throughout the country. IMCC members employ a variety of communications technologies, including wired, wireless and direct broadcast satellite ("DBS"), to serve the residential multiple dwelling unit ("MDU") market, which includes some 30 million households. IMCC members compete primarily with both franchised cable operators and incumbent local exchange carriers ("LECs"). Without the competition fostered by IMCC members and other emerging technology companies, MDU owners and managers, but *primarily residents*, would have little choice among cable and telecommunications providers.

IMCC offers comments on the following issues raised in the NOI: General information on PCOs and how they compete in the MDU market; barriers to competitive entry in the MVPD marketplace; and program access.

1. How PCOs compete in the MDU market

Most PCOs utilize Satellite Master Antenna Television System ("SMATV") to provide MVPD services to residents of MDUs. Although there are a handful of relatively large PCOs in terms of subscribership, most private operators serve approximately 3,000 to 4,000 customers. Altogether, the PCO industry services about 1 to 2 percent of the MVPD market nationwide. However, in the 100-unit or larger MDU market, that percentage increases to a significant 6 to 8 percent.

PCOs compete directly with franchised cable operators in the MDU market, offering many of the same services, including video, local and long-

distance residential telephone and Internet access. Although DBS subscribership is growing, in many areas PCOs offer the only real alternative to cable because the “local-into-local” service now being offered by DBS providers (after enactment of the Satellite Home Viewer Improvement Act of 1999) is severely limited in its geographical scope.

Without the presence of PCOs, many of which utilize DBS, MDU owners would lose whatever negotiating leverage they have against franchised cable operators. The MSOs, as virtual monopolies, would then have no incentive to improve the products and services offered to MDU residents. PCO competition is therefore crucial to fulfillment of the goals of the 1996 Telecommunications Act.

PCOs are able to compete in the MDU market by offering products that are superior to and often less expensive than those offered by incumbent MSOs, and by providing fast, efficient and friendly customer service to MDU residents. Furthermore, PCOs are better equipped than most cable operators to offer MDU residents a channel lineup that is specifically tailored to the demographics and interests of the local market, and use this capability to differentiate themselves from their competitors. These advantages are incidental to the more “local” nature of PCO services when compared to the generic services provided by large MSOs with nationwide reach. Thus most PCOs manage to establish a mutually beneficial relationship with MDU owners that is very different from the kind of adversarial relationship that often times exists between owners and cable incumbents facing no competition.

2. Impact of the regulatory environment and barriers to entry

Paragraphs 9 and 10 of the *NOI* ask how the current regulatory environment affects competitive entry into MVPD markets, and for information on barriers to competitive entry in these markets generally.

As far as PCOs and managers of MDU properties are concerned, the most significant obstacles to competitive entry are state and local mandatory access laws, perpetual access agreements that MDU managers have inherited from a pre-competitive era, and the refusal to cable incumbents to cooperate in the application of the Commission’s Inside Wiring Rules.¹

As IMCC has pointed out on numerous occasions, mandatory access laws provide special rights for those least in need of special rights – large franchised cable companies that already have all of the inherent competitive advantages associated with a well-known brand, access to public rights-of-

¹ 47 C.R.R. §§ 76.800 *et. seq.*

way, and unparalleled economies of scale and scope. Furthermore, such laws preclude the formation of exclusive access agreements between PCOs and MDU managers; without the ability to form exclusive access and service agreements over a minimal period of time, most PCOs are unable assure potential investors that they will recover the investment needed to serve an MDU property at all. As a result, mandatory access laws, which are themselves a relic of a pre-competitive era, undermine competition in MDU markets and serve only to further entrench the monopoly position of incumbent cable companies. If the Commission is seriously interested in enhancing MVPD competition, all mandatory access laws should be explicitly pre-empted.

Like mandatory access laws, perpetual MDU contracts – contracts effective for the duration of the incumbent’s cable franchise and any renewals thereof – are a relic of a pre-competitive era and today serve no purpose other than to undermining the emergence of true competition.

Finally, the effect of the Inside Wiring Rules, first promulgated in 1996, in opening up MDU markets to video competition, can hardly be overstated. However, as IMCC has pointed out in a series of Requests for Declaratory Ruling filed in 2005, incumbent cable companies have developed a number of anti-competitive tactics designed to deter MDU owners from utilizing those rules, and these tactics are routinely, effectively and illegitimately used to suppress competitive entry into many MDU buildings across the country. The Commission can and should take affirmative steps to preserve the integrity of its own rules, and thereby further the pro-competition policy embodied therein, by taking a clear stand on the penalties to be imposed on incumbents that ignore legitimate attempts to invoke the FCC inside wiring procedures, or otherwise seek to intimidate MDU owners from exercising the rights secured under those procedures.

In its recent *Franchise Reform* Report and Order (adopted but not yet released as of this date), the Commission has shown its willingness to boldly preempt state and local laws that constitute barriers to competitive entry into the MVPD market, even when there are serious questions regarding the Commission’s authority to take such action.² IMCC urges the Commission to further demonstrate its commitment to competition in taking action in an area that is much less controversial by preempting state and local mandatory access laws and the perpetual agreements those laws have engendered.

3. Cable franchise reform

² *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (adopted Dec. 20, 2006), Press Release (Dec. 20, 2006).

Paragraphs 11 and 12 of the *NOI* ask for comments on how proposals contained in the Commission's ongoing *Franchise Reform NPRM*³ may affect competition among MVPDs.

In general, IMCC welcomes the emergence of another competitor, namely telephone companies, in the market for video services, and agrees with the Commission that the cable franchising process should be scrutinized to ensure that the cable industry does not derive any unfair advantages from the LFA structure or process. However, to the extent that the Commission's interest is not in facilitating market entry by a particular class of new entrants, but in leveling the playing field for all competitors, the Commission cannot limit its scrutiny to the franchising process, but must extend its focus to include related anti-competitive practices, especially anti-competitive mandatory access laws and perpetual contracts, as discussed above.

With regard to franchise reform, it is crucial that in its efforts to ease the entry of telephone companies into video markets, the Commission not confer on those companies any benefit or advantage that is not equally available to all other entrants, including PCOs. As IMCC emphasized in its Comments in the *Franchise Reform* proceeding, the ability (conferred by several new state laws enacted during the past two years) to utilize public rights-of-way ("PROWs") without the need to negotiate a full-blown cable franchise provides a new and significant business opportunity for many PCOs. IMCC supports the Commission's efforts to establish national uniformity in the regulatory treatment of access to PROWs. At the same time, however, we emphasize the need for a level playing field: If the proposal for a national franchise system to replace local franchising for video providers using public rights-of-way is adopted, the Commission must ensure that such national franchises are available to all competitors in the market, including PCOs, on an equal basis and on the same terms and conditions.

4. Program access

Paragraph 20 of the *NOI* seeks comments on the effectiveness of the Commission's program access rules.

As IMCC has stated in earlier filings on this issue,⁴ Section 628's ban on exclusive programming contracts between programmers and affiliated

³ *Id.*

⁴ Comments of IMCC, *In the matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Sunset of Exclusive Contract Prohibition*, CS Docket No. 01-290, filed on Nov. 30, 2001.

cable television distributors⁵ is essential maintaining a competitive marketplace on behalf of consumers. The ban on discriminatory access to affiliated programming and exclusive contracts in particular becomes even more crucial as the trends toward clustering and consolidation of cable systems under common ownership continues. It is especially important that cable's competitors, including those that obtain their programming via direct broadcast satellite (DBS), have non-discriminatory access to "must see" content such as local sports programming, if they are to compete at all.

Data on the extent to which PCOs are being denied nondiscriminatory access to quality programming is difficult to obtain because, although program vendors must publish "rate cards," these disclosures reveal very little about what the MSOs are actually paying for programming. IMCC estimates that PCOs pay, on average, 40 percent more than the MSOs for the same programming. Discriminatory pricing for programming directly subverts the viability of competition in MVPD markets, and clearly demonstrates not only why the program access rules are necessary, but why they should be strengthened – for example, by eliminating the irrational and unjustifiable "terrestrial delivery" exception that allows vertically integrated cable firms to evade the rules by migrating their programming away from satellite to wireline distribution.

Conclusion

Without any doubt, the most significant event on the competitive MVPD landscape during this past year has been the decision of several telephone companies to enter video distribution markets to compete with franchised cable operators. However, as policy-makers celebrate this decision, they must not lose sight of two facts: First, this is not the first time that telephone companies have tried to compete for video subscribers, and their record in this regard does not provide grounds for excessive optimism. Second, a duopoly of large and relatively monolithic industries, cable and telephone companies, each with a long history of monopolistic pricing and behavior, cannot be mistaken for true competition as envisioned in the Telecommunications Act of 1996.

These two caveats underline the importance of maintaining the competitive viability of those that provide a "third wire" into America's homes, the small independent companies, especially PCOs, that have quietly demonstrated their commitment to competition and customer service over time, while others garner the publicity and make the headlines.

⁵ 47 U.S.C. § 548(c)(5).

